No. 18705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORMAN NATHAN SEMLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

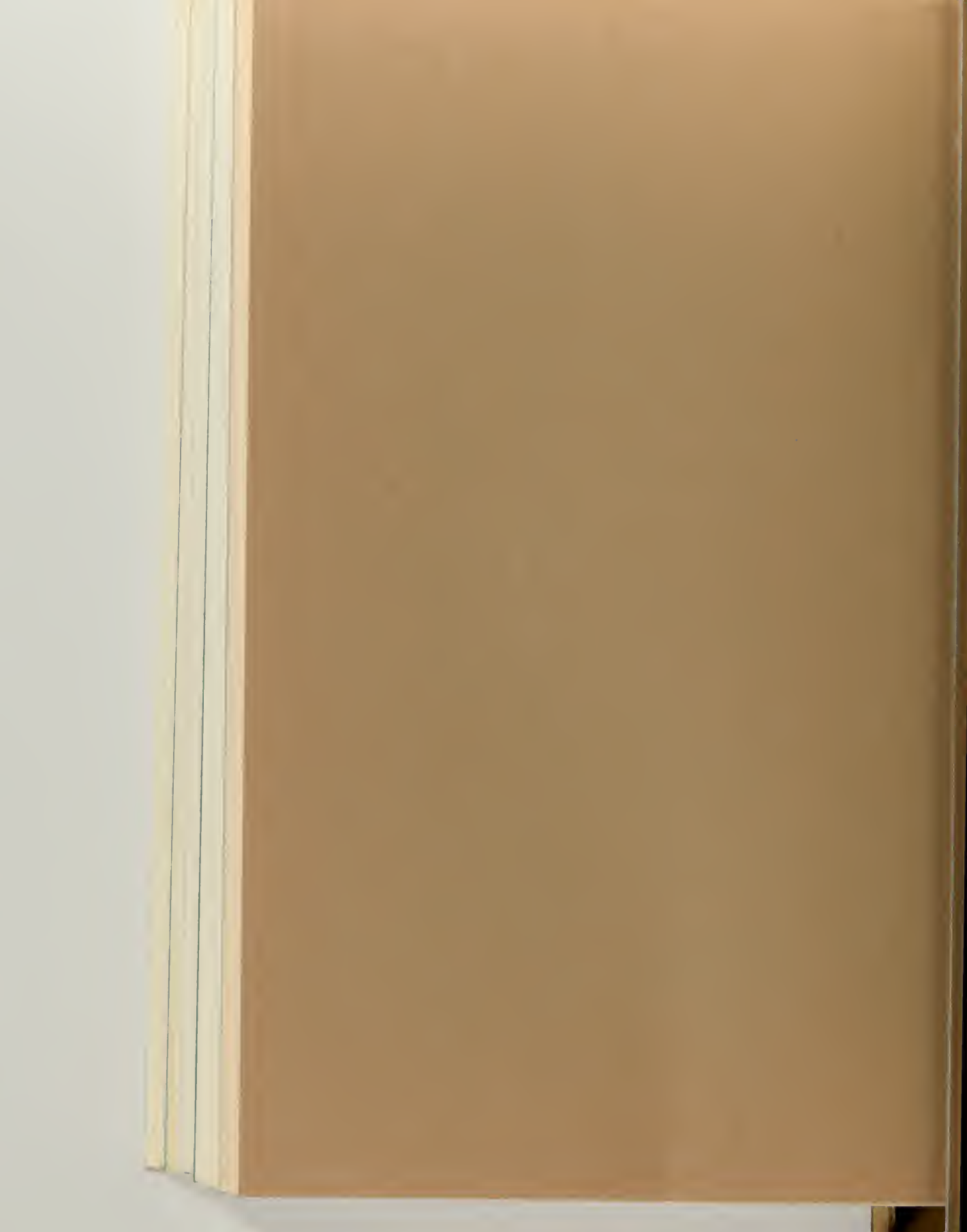
Appellee.

Appeal From the United States District Court for the District of Arizona.

APPELLANT'S CLOSING BRIEF.

ROGAN & RADDING,
DAVID M. RICHMAN,
301 East Olive Avenue,
Burbank, California 91502,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.



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POINT I.

The Evidence Was Not Sufficient to Sustain a Conviction of Appellant Semler on Counts I, V, VII and X.

The Government's brief argues that the evidence was sufficient to sustain a conviction of appellant Semler. They cite a counter-statement of facts in the Reply Brief from pages 5 through 13, in which they set forth eleven so-called "episodes." A careful examination of the Government's counter-statement of facts and a review of the "episodes" indicates that appellant Semler is not involved in 8 of the 11 "episodes". The counter-statement of facts show that Sgt. Howell and Sgt. Wooldridge organized a group of airmen and civilians working at Davis-Monthan Air Force Base in 1961 and

the early part of 1962 to steal surplus material belonging to the Government. There is no question that this gang stole from the Government and that the leaders were Sgt. Howell and Sgt. Wooldridge. There is also no question that there were three sales by Howell of some of the stolen property to Semler Industries, Inc. The sales were on March 22, 1962, March 27, 1962 and May 26, 1962, and are set forth in Counts V, VII and X in the Indictment.

The testimony is clear that the thefts were completed by the Howell-Wooldridge group at the Air Force Base and the only involvement of appellant Semler is that he was called on the telephone by Howell and offered the purchase of this material. This was after Howell called another surplus dealer and did not find him in his place of business.

There is no evidence in the 2,600-page record indicating that appellant Semler was part of the conspiracy to steal, even if the case is construed in the most favorable light to the Government. There have been only insinuations, suspicions and innuendoes raised that appellant Semler was a co-conspirator.

This is consistent with the entire manner in which the trial was conducted by the Government. They were not content to indict and convict Sgt. Howell, Sgt. Wooldridge and the other participants in the theft of surplus airplane parts from the Air Force Base. They brought in one of the innocent purchasers of some of the stolen property in the person of appellant Semler. They cite *Souza v. U.S.,* (9th Cir. 1962), 304 F.2d 274 at p. 277, and *Bolen v. U.S.,* (9th Cir. 1962), 303 F.2d 870 at p. 874, in support of their claim that the evidence against appellant Semler is sufficient to support a conviction. (Government Reply Brief p. 15).

In the *Bolen* case, *supra,* the appellants were indicted and convicted of using the mails to defraud. They sent sight drafts against bills of lading through the mails without delivering boats ordered by customers, and they obtained funds from the bank by means of false representations or promises. The Court properly held that this was sufficient to show the required criminal intent, even though the defendants intended to repay the bank or make delivery of the boats later. *LeMore v. United States,* (5th Cir. 1918), 253 Fed. 887.

In the *Souza* case, *supra,* the defendant confessed that he stole lead pipe belonging to the Government and sold it to a junk man. The junk man was not indicted. Souza was indicted and convicted. The question arose in that case whether there was a criminal intent on the part of Souza, that is, with knowledge that the property belonged to and was stolen from the United States Government. In the case of *Morissette v. United States,* 342 U.S. 246 (1952), the Supreme Court stated at page 263:

> "We hold that mere omission from Section 641 of and mention of intent will not be construed as eliminating that element from the crimes denounced."

Adopting the above, this Court, in *Souza v. United States, supra,* stated at page 276:

> "While it is to be noted that in Morissette, the Supreme Court considered only that part of Section 641 which makes it an offense to embezzle, steal, purloin or knowingly convert to his own use or the use of another, of property of the United States, and not that part of the section under which appellant was charged which makes it an offense to sell, without authority, property of the

United States, we believe that the reasoning of the Supreme Court in Morissette compels the conclusion that criminal intent is an essential element of the offenses. . . ."

In the *Souza* case this Court stated at page 277:

"Not only was the jury instructed that the prosecution was required to prove beyond a reasonable doubt that the property described in Counts II, III and IV was the property of the United States, that the same was sold or conveyed by appellant without authority, *and that each sale or conveyance was made by appellant with knowledge on his part* of ownership of the property by the United States, *but also with knowledge that the property had been stolen from the United States.*" (Emphasis added.)

In this case, the Government did not prove that there was an agreement or a confederation of appellant Semler with the conspirators to steal Government property. Semler was an innocent purchaser for value on the three occasions he made purchases from Howell on March 22, 1962, March 27, 1962 and May 26, 1962. He paid for the material in the manner requested by Howell, in cash, after drawing checks for the purchase price. Purchase orders were made out and shipments were made in the name of the company and everything was done by appellant Semler to complete the purchases in the ordinary course of business, using real names without indicating any of the indicia of agreement or confederation with the conspirators to commit one or more of the unlawful acts.

In *Braverman v. U.S.*, 317 U.S. 49 at 53, the Supreme Court stated:

"The gist of the crime of conspiracy as defined by the statute is the agreement or confederation

of the conspirators to commit one or more unlawful acts 'where one or more of such parties do any act to effect the object of the conspiracy.' The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime." Citing *Bannon v. U.S.,* 156 U.S. 464, 468-9; *Joplin Mercantile Co. v. U.S.,* 236 U.S. 531, 535-6; *U.S. vs. Rabinowich,* 238 U.S. 78, 86; *Pierce v. U.S.,* 252 U.S. 239, 244.

"For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, *it is in either case that agreement which constitutes the conspiracy which the statute punishes.*" (Emphasis added.)

In the case of *United States v. Nardiello,* (3d Cir. 1962), 303 F.2d 876 at 879, the Court stated:

"The evidence must be of such a kind or quality as to permit a jury to find beyond a reasonable doubt that the landlord, Nardiello, knew of and contributed to the conspiracy. See *United States v. Dellaro,* 99 F.2d 781 (2 Cir.1938). We conclude that the above facts do not meet this standard. Obviously, the enumerated circumstances give rise to considerable suspicion, but suspicion is inadequate. The deficiency in the government's case lies in the failure to prove knowledge on the part of Nardiello that his acts 'innocent in themselves' were aiding the conspiracy. United States v. Rappaport, 292 F.2d 261, 264 (3 Cir.), cert.denied, 368 U.S. 827, 82 S.Ct. 48, 7 L.ed. 2d 31 (1961).

> "The record is barren of any association by Nardiello with any of the alleged conspirators, other than Memoli and Pinto, the two tenants of the property. Compare United States v. Monticello, 264 F.2d 47, 49 (3 Cir. 1959)."

In the case of *Marino v. U.S.,* (9th Cir. 1937), 91 F.2d 691 at 695, this Court stated:

> "On the other hand, an accused must join in the agreement to be guilty of a violation of the statute for even if he commits an overt act, he does not violate the statute unless he joined in the agreement."
>
> *United States v. Hirsch,* 100 U.S. 33, 34;
> *Stack v. U.S.,* (9th Cir.) 27 F.2d 16, 17;
> *Weniger v. U.S.,* (9th Cir.) 47 F.2d 602, 603.

Viewed in the light most favorable to the Government, the gist of the evidence adduced against appellant Semler is that he made three purchases of radio-receivers from Howell in March and May, 1962. The Government failed to show that appellant Semler conspired with any other persons named as conspirators (a) to steal Government property, (b) to receive stolen Government property with knowledge that the property was stolen, or (c) that appellant Semler entered into an agreement to accomplish an illegal act. There was no substantial evidence that appellant Semler joined in the agreement and, therefore, he cannot be guilty of a violation of the conspiracy statute because an accused must join in the agreement to be guilty of conspiracy.

Bannon v. U.S., 156 U.S. 464, 468;
Joplin Mercantile Co. v. U.S., 236 U.S. 531, 535;
Terry v. U.S., (9th Cir.) 8 F.2d 28, 29;
Weniger v. U.S., (9th Cir.) 47 F.2d 692;
Heskett v. U.S., (9th Cir.), 58 F.2d 897, 902;
Craig v. U.S., (9th Cir.) 81 F.2d 816, 822.

The Courts have held that even if he commits an overt act, he does not violate the conspiracy statute unless he joined in the agreement. Knowledge of membership in the conspiracy, the part played by each of the members, and the division of the spoils is immaterial. He must know the purpose of the conspiracy, otherwise he is not guilty.

United States v. Hirsch, 100 U.S. 33, 34;
Stack v. U.S., (9th Cir.) 27 F.2d 16, 17;
Coates v. U.S., (9th Cir.) 59 F.2d 173, 174.

The law is clear that a conspiracy is bottomed on an agreement to accomplish an illegal act, and without such agreement, which must be proved, there can be no conspiracy for a conspiracy "is a partnership in criminal purposes."

Mercante v. U.S., (10th Cir.) 49 F.2d 156, 157;
Johnson v. U.S., (9th Cir.) 62 F.2d 32, 34.

Examination of Sgt. Howell's testimony with his rambling, disconnected, uncertain, and improbable statements, just as he gave them, will convince the Court that his testimony against appellant Semler does not measure up to that standard of substantial evidence which can be the basis of a conviction by the jury. To sustain the conviction of appellant Semler there must be in the record substantial evidence of his agreement to join a conspiracy to rob the Air Force Base of material, and participation in the agreement to accomplish the illegal act. No such evidence is in the record. The Government's case proves a theft by civilians and airmen led by Sgt. Howell and Sgt. Wooldridge without the knowledge, agreement, participation or activity by appellant Semler to accomplish these thefts.

The Government's attempts to make out a case against appellant Semler by circumstantial evidence is of the flimsiest calibre. The question as to the suffi-

ciency of either direct or circumstantial evidence is whether it is substantial, taking the view most favorable to the Government.

Glasser v. U.S., 315 U.S. 60;
Rossetti v. U.S., (9th Cir.1963) 315 F.2d 86;
Miller v. U.S., (9th Cir. 1962), 302 F.2d 659;
Bowler v. U.S., (9th Cir.1957), 249 F.2d 806;
Elwert v. U.S., (9th Cir.1956), 231 F.2d 928;
Sachs v. U.S., (9th Cir.1960), 281 F.2d 189.

Remmer v. U.S., (9th Cir.1953), 205 F.2d 277, holds that the proper test of whether the evidence is sufficient to sustain a verdict of guilty is:

". . . could reasonable minds say that the evidence excludes every reasonable hypothesis but that of guilt. . . ." (at p. 288).

In *Enriquez v. U.S.,* Docket No. 17928, March 4, 1963 (9th Cir.) ..... F.2d ....., this Court stated:

"Whenever we add to the untrustworthiness of the testimony of the principal witness against the appealing defendant, the proof introduced as to intent plus the other testimony under a theory of conspiracy to be proved, we reach the firm and final belief that the appealing defendants did not have a proper trial, because inadmissible evidence on the issue of intent was permitted to be introduced which may have inflamed and influenced the jury in a weak case such as this."

In *Farrell v. U.S.,* (9th Cir. Docket No. 18241, Aug. 7, 1963) .....F.2d....., at page 6, this Court stated:

"The decisions reveal two tests which are applied in determining the sufficiency of either direct or circumstantial evidence to support a jury verdict. The verdict of a jury must be sustained if there is substantial evidence when viewed in the

light most favorable to support the judgment. *Glasser v. U.S.,* 315 U.S. 60 (1942); *Williams v. U.S.,* 273 F.2d 781 (9th Cir. 1959) cert.den. 362 U.S. 951; *Robinson v. U.S.,* 262 F.2d 645 (9th Cir. 1959); *Miller v. U.S.,* 302 F.2d 659 (9th Cir. 1962). The verdict of a jury must be sustained if reasonable minds, as triers of the fact, could find that the evidence excludes every reasonable hypothesis but that of guilt."

Remmer v. U.S., 205 F.2d 277 (9th Cir. 1953).

See also

Bolen v. U.S., 303 F.2d 870 (9th Cir. 1962).

In *Glasser v. U.S.,* 315 U.S. 60 (1941), the Supreme Court stated at page 71:

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . such duty is not to be discharged by rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity. *Patton v. U.S.,* 281 U.S. 276, 312."

In *Glover v. U.S.,* 306 F.2d 594 at p. 595 (10th Cir. 1962), the Court stated:

"The existence of the conspiracy cannot be established against an alleged conspirator by evidence of acts or declarations of his alleged co-conspirators done or made in his absence. While evidence may have been sufficient to cast suspicion upon Glover, that was not enough. *Guilt may not be inferred from mere association.* We conclude that the evidence viewed in the light most favorable to the Government, was not sufficient to support a ver-

dict of guilty on Counts I, V and VI." (Emphasis added).

Thomas v. U.S., (10th Cir.) 239 F. 2d 7, 10;
Corbin v. U.S., (10th Cir.) 253 F.2d 646, 649;
Evans v. U.S., (9th Cir.) 257 F.2d 121, 126, cert. den. 358 U.S. at 866.

It is clear from all the circumstances in this case, the jury could not infer the existence of a conspiracy in which appellant Semler participated. Nor could they find him guilty of three substantive counts because the Government failed to prove knowledge on Semler's part, when he bought the material, that it was stolen property.

POINT II.

The Court Improperly Prevented Cross-Examination of Principal Witness Howell by Permitting Him to Invoke the Privilege of the Fifth Amendment Relating to Other Sales of Stolen Government Property Within the Period of the Indictment Inasmuch as This Was Within the Scope of the Direct Examination and Was a Proper Impeachment Question.

We covered this point fully in the Opening Brief, pages 25, 26, 27 and 28. The question on cross-examination by appellant Semler's counsel requesting Howell to disclose whether, during this period, he sold merchandise to persons other than appellant Semler was very material and a proper impeaching question. Rereading the cross-examination by Mr. Chandler of Howell, (Note 6 in Opening Brief on pages 11 and 12), clearly indicates that it was serious error to have excluded the answer to this question. It would have shown, perhaps, that Howell and his associates sold other stolen material to other surplus electronic dealers throughout the country.

In the case of *Alford v. U.S.*, (1930) 282 U.S. 686 at 691 and 692, the Supreme Court stated the following:

> "Cross-examination of a witness is a matter of right. . . . Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.
>
> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony."

POINT III.

The Court Erred in Failing to Provide Appellant Semler With a Fair Trial and an Impartial Jury.

We have stated at great length on pages 17 through 20 of the Opening Brief the facts relating to the unfair trial received by appellant Semler. On pages 28 through 38 we set forth the argument and reasons why the trial was not fair and the jury was not impartial in this case. On page 33 of the Government's Reply Brief they raise the question that we discussed a news-

paper article dated July 3,1962, which was not transcribed in the Appendix of the Opening Brief. We did not put this article in the Opening Brief because it was the first article in the case and did not mention appellant Semler. However, since it was the beginning of the barrage of newspaper publicity, we now set it forth in the Appendix together with the photograph which appeared in connection with the damaging newspaper article.

POINT IV.

The Motion to Dismiss the Indictment and the Motion to Strike Appears in the Transcript of the Record and Is Properly Raised in This Appeal.

The transcript of the record, Vol. I, is part of the file in this appeal. The motion to dismiss the Indictment and the motion to strike appear in the transcript of the record and set forth the reasons why these motions should have been granted by the Court below. It raises the issue on the record and is properly before this Court. There is a memorandum in support of the motion to dismiss, together with an affidavit and the motion to dismiss. Similarly, the motion to strike and the memorandum in support thereof is set forth in the transcript of the record and is fully before this Court on this appeal.

Conclusion.

For the reasons stated in the opening brief and further developed herein, it is clear that the conviction must be reversed.

Dated at Burbank, California,
January 23, 1964.

Respectfully submitted,

ROGAN & RADDING,
DAVID M. RICHMAN,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this closing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing closing brief is in full compliance with those rules.

DAVID M. RICHMAN,
Attorney for Appellant.

WEATHER
Forecast for Tucson: Cloudy, ittle change.
Temperatures
'esterday: HIGH 92 LOW 79
'ear Ago: HIGH 95 LOW 68
U. S. Weather Bureau

ARIZONA DAILY STAR
July 3, 1962

The

'L. 121 NO. 184

Entered as second class matter, Post Office, Tucson, Arizona

Will Face Charges

Four of six local men charged with stealing radios from planes at Davis-Monthan FB are brought handcuffed into the Federal Building. Sgt. John J. Milne, left, hides his ce as A2C Jean Ybanez lowers his head. A3C Delevin L. Williams, Jr., third from left, asps his fatigue hat as A2C Pedro Leyva tries unsuccessfully to hide behind his hat. (Jack eaffer photos by Dick Wisdom)

APPENDIX.

Newspaper Article

THE ARIZONA DAILY STAR—July 3, 1962
(Photo of arrest of six suspects on preceding page)

SIX SUSPECTS ARRESTED IN AFB THEFT CASE

$160,000 In Loot
Estimated Taken

By BOB THOMAS

Government agents yesterday arrested five Air Force men and a civilian worker at Davis-Monthan AFB as suspected members of a ring which has stolen military radio sets worth more than $160,000 from D-M and Luke AFB, near Phoenix.

The thefts at D-M alone were estimated to total in excess of $100,000 and more than $60,000 at Luke.

It is believed to be the largest theft of government property to occur in this area.

Arrested were 1st Lt. Jack Raymond Kirves, 29; S-Sgt. John J. Milne, 29; A2C Jean Ybanez, 22; A2C Pedor Leyva, 21; A3C Delevin Leon Williams, Jr., 19, all members of the 15th Fighter Interceptor Sqdn., and Robert E. Clark, a civilian working as a warehouse foreman for the 2704th Aircraft Storage and Disposition Group.

Clark lives at 8011 E. 17th Place and Milne at 1537 National Blvd. The others live on the base.

The six D-M men were arrested on information given investigators by three airmen who were arrested June 24 after an aborted attempt to steal radio transmitters from Luke AFB.

Arrested in the $65,000 theft were S-Sgt. Louis Giavelli, 30, of D-M, and S-Sgt. Clint R. Woolridge, 31, and A2C Garry D. Rowe, 23, both of the AF gunnery range at Ajo.

Guards at Luke AFB spotted a strange car on the base and stopped it. Three men in the car ran off in the darkness and escaped. In the car were a number of stolen radio sets.

The three suspects were picked up at their homes a few hours later. The next day FBI agents recovered $40,000 worth of radio sets that had been covered with brush and hidden in the desert off the Benson Hwy.

Edward Boyle, FBI agent in charge of Arizona, said yesterday that the investigation is still continuing and that other arrests may occur.

FBI agents are searching for other hidden radio sets and are investigating how the sets were disposed of.

The radios—for both sending and receiving—were described by an FBI agent as "a hot item" and much in demand for both military and civilian aircraft.

They cost the government more than $3,300 for each set.

Boyle said the sets were probably disposed of through both local and interstate outlets. He would not comment on the question of whether they were smuggled out of the country for use by planes of a foreign country.

Both the FBI and the Air Force's Office of Special Investigations (OSI) have been investigating the D-M thefts since the first of this year.

Most of the radio sets have been stolen from surplus planes in the 2704th's storage yard at D-M where planes are "junked" for useable parts or made flyable

again for U.S. military uses or sold to private or foreign customers.

A few sets were apparently stolen directly from D-M planes. The Luke AFB radios were taken from a warehouse.

Investigators hinted that the thefts may have occurred over a two to three-year period and that the over-all value of the missing equipment may reach an estimated $300,000 to $400,000.

"They've been stealing them blind out there (storage yard) for years," one source said.

The six local suspects were held in Pima County jail in lieu of bond last night.

U.S. Commissioner Tom McKay set a $5,000 bond on Lt. Kirves and $2,000 bond on each of the remaining five suspects.

He continued their hearing on the charges—theft of government property—until next Monday at 1:30 p.m.

The men appeared noncommittal but tense at their hearing. Clark's pregnant wife accompanied him to the hearing yesterday in the Federal building.

The three airmen were arrested at their work in the 15th FIS. They appeared at the hearing still wearing their fatigue uniforms.

Clark, Sgt. Milne and Lt. Kirves were in civilian clothes and were arrested near or at their homes.

Almost the entire FBI office in Tucson took part in the almost simultaneous arrests.